ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED JUNE 27, 2001)
(EXCEPTIONS DUE 7-19-01)
(REPLIES TO EXCEPTIONS DUE 8-10-01)

FEDERAL MARITIME COMMISSION

DOCKET NO. 00-l 1

NEW ORLEANS STEVEDORING COMPANY

v.

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

New Orleans Stevedoring Company ("NOS") filed a complaint in which it alleged that it was the victim of unfair and discriminatory practices by the Board of Commissioners of the Port of New Orleans ("Board") in the allocation of marine terminal facilities in violation of sections 10(d)(3) and 10(d)(4) of the Shipping Act of 1984 ("Act"). It is held:

1. The refusal of the Board to allow NOS to use certain marine termmal facilities along the Mississippi River was not an unreasonable refusal to deal or negotiate in violation of section 10(d)(3) of the Act. The Board was entitled to adhere to a policy of not allowing either leases or short term assignments of the facilities in order to avoid interference with the construction contractor which had been engaged to accomplish a major renovation.

2. The Board did not provide an unreasonable preference or advantage in violation of section 1 O(d)(4) of the Act in relaxing its policy of noninterference with the construction contractor for the sole purpose of compensating lessees for the loss of use of or access to leased premises because of the construction project. NOS had voluntarily terminated its status as a lessee of facilities along the Mississippi River in order to avoid the costs associated with such status. In so doing NOS traded lower operatmg costs for the loss of a guarantee of the use of marine terminal facilities.

3. The Board's actions were not in violation of its tariff.

4. The complaint by NOS is dismissed.

Joseph A. *Klausner* for complainant.
Paul M. Heylman, Michael C Griffin, J. Michael Orlesh and *Gerald 0 Gussoni, Jr.* for respondent

INITIAL DECISION BY PAUL B. LANG, ADMINISTRATIVE LAW JUDGE'

This proceeding arises out of a complaint in which New Orleans Stevedoring Company ("NOS") alleges that it was the victim of unfair and discriminatory practices by the Board of Commissioners of the Port of New Orleans ("Board") in the allocation of marine terminal facilities in violation of sections 1 O(d)(3) and 1 O(d)(4) of the Shipping Act of 1984 ("Act"), 46 U.S.C. app. § 1709(d)(3) and (4).[2] In its prayer for relief NOS seeks the issuance of an order directing the Board to cease and desist from the alleged violations of the Act, as well as the award of $1 ,000,000 or more in reparations along with interest and attorney's fees

Comnlamant's Direct Case

The direct case submitted by NOS consists of a brief, 52 numbered exhibits and 10 survey reports with photographs. The brief itself contains citations to portions of transcripts of the depositions of David Wagner and Ron Brinson of the Board staff and Henry Flanagan of NOS.

NOS maintains that it has been forced out of business in the Port of New Orleans because of the unreasonable refusal of the Board to grant it access to marine terminal facilities (deep water

[1] This will become the decision of the Commission in the absence of review (Rule 227, Rules of Practice and Procedure, 46 C F.R. § 502.227)

[2] Section 10(d)(3), in pertinent part, prohibits marine terminal operators from unreasonably refusing to deal or negotiate Section 10(d)(4), in pertinent part, prohibits marine terminal operators from giving, " any undue or unreasonable preference or advantage or [from] impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person."

berths and storage space for cargo and containers) along the Mississippi River while providing such access to certain of its competitors. The alleged result of this refusal by the Board was to cause NOS to lose the opportunity to provide stevedoring services to ocean carriers whose vessels could not be worked satisfactorily at other facilities in the port on account of an insufficient depth of water to accommodate vessels of up to 40 foot draft and because of the lack of access to gantry cranes. NOS also alleges that the ultimate result of the Board's unlawful actions was to force it out of business in New Orleans.

The brief by NOS includes a narrative of its unsuccessful attempts to obtain suitable facilities on the river after it had declined to renew its lease of such a facility. According to NOS each of those attempts was rebuffed by the Board, ostensibly because the facilities were either unsuitable for the use proposed by NOS or were unavailable because of a major renovation project. It is the position of NOS that the reasons given by the Board were pretexts to enable the Board to favor competing companies. In support of its contentions NOS has submitted ten survey reports along with photographs all of which reflect observations by the surveyors and representatives of NOS that facilities to which NOS had been refused access were used by other marine terminal operators, either at the time of the refusal or shortly thereafter, or could have been used by NOS without interfering with the work of the construction contractor.

NOS has also cited portions of FMC Tariff No. 2 ("tariff'), promulgated by the Board[3], in support of the contention that the violation of its own tariff by the Board is further indication of the unreasonableness of its actions with regard to the allocation of marine terminal facilities.

[3] In spite of its designation as a tariff, the document is actually a marine terminal operator schedule within the contemplation of section 8(f) of the Act, 46 U.S.C. app. § 1707(f).

In support of its claim for reparations NOS has submitted the report of David G. Raboy, Ph.D., Chief Economic Consultant for Patton Boggs LLP (Ex. 49). In his report Dr. Raboy concludes that the fair market value of NOS at the point of termination was at least $5.4 million. NOS has also submitted an auditors' report of its financial data and annual net profit from 1991 through 1999 (Ex. 50).

In further support of its reparations claim NOS has submitted a statement (apparently prepared by or under the direction of Henry Flanagan) of expected revenue, expense and profit associated with the stevedoring of vessels of Mediterranean Shipping Company (" MSC"), Chilean Lines and TBS Shipping, all of whose vessels NOS would allegedly have serviced were it not for the wrongful actions of the Board (Ex. 8). The statement concludes with entries indicating that the total profit lost was estimated at $1,047,104.50. The estimate is based upon the supposition that NOS would have provided stevedoring services to 51 MSC vessels per year from November 1, 1999, to March 30, 2001, and to 41 Chilean and TBS vessels per year from May 29, 2000, to March 31, 2001.

Resnondent's Direct Case

The Board's reply brief is accompanied by the verified declarations of Kyle C. Jones, P.E., Manager, Capital Improvement Program of the Board, and David A. Wagner, the Executive Vice President of the Board, and 100 exhibits consisting chiefly of correspondence between the Board, NOS and other users of the port, transcripts of public meetings of the Board, portions of deposition transcripts and affidavits by certain of the Board's executives and employees. The Board's position is that the problems experienced by NOS and its inability to continue operations in the port of New Orleans were largely the result of its own business decision to terminate its status as a long term lessee of port facilities at the Napoleon Avenue terminal which lies along the Mississippi River. The

Board further maintains that the actions of which NOS complains were reasonable nondiscriminatory policies designed to strike a balance between the necessity of mmimizing interference with a major renovation project and of meeting the Board's obligations to provide facilities to long term lessees who had been adversely affected by the renovation. The crux of this argument is that, in deciding not to renew its lease, NOS knowingly and voluntarily gave up a contractual right to the availability of terminal facilities in exchange for the lower operating cost associated with short term assignments, including relief from the annual guarantee ofminimum cargo tonnage which was required of lessees. Therefore, according to the Board, it had no obligation to compromise its policy against minimizing interference with the construction project in order to accommodate NOS. The Board maintains that NOS was treated no differently than any other company without a long term lease and, in fact, was granted numerous concessions, primarily in the form of the postponement of deadlines for exercising options, submitting proposals and for removing equipment and cargo from locations which it was no longer entitled to use. Finally, the Board argues that its actions with regard to the allocation of its facilities were in accordance with its tariff which vests discretion in the Board to manage the port in an efficient and economically viable manner.

Complainant's Reply Brief

The reply brief of NOS, which is accompanied by three additional exhibits, disputes the Board's recitation of events subsequent to the disruption of cargo operations due to the impact of Hurricane Georges in 1998. Those events are relevant only to the extent that they were cited by representatives of the Board as illustrating the adverse effects of allowing cargo to be stored in locations with insufficient capacity.

NOS also challenges the Board's stated protocol for the assignment of space within the Napoleon Avenue complex. According to NOS the proposition that the Board limited such

assignments to lessees is belied by the fact that the recipients of the assignments did not have leases of the space which was assigned and that the Board owed no contractual obligation to the lessees.[4]

Findings of Fact

1. NOS is a division of James J. Flanagan Shipping Corporation.

2. NOS was a marine terminal operator in the port of New Orleans, Louisiana from on or before 1993 until on or about May 29, 2000.

3. The Board is a nongovernmental body authorized by state law to generally operate and allocate facilities in the port for maritime functions including the berthing of vessels, the loading and discharge of cargo onto and off of vessels and the storage of cargo, containers and equipment.

4. Marine terminal facilities in the port are located along either the Mississippi River or the Industrial Canal. Vessels pass into and out of the canal through the Mississippi River Gulf Outlet ("MRGO").

5. Marine terminal facilities along the river are able to accommodate vessels of 40 foot draft or more.

6. Marine terminal facilities along the canal are able to accommodate vessels of no more than about a 35 foot draft.

7. The Board authorizes marine terminal operators and stevedores to use port facilities either through long term leases or through short term assignments which are frequently made on a ship-by-ship basis.

8. Lessees are guaranteed access to and use of the leased facilities during the term of their leases. However, lessees are required to assume financial obligations related to the fixed costs of

[4] According to the record NOS alleged at one time that the Board misled it into failing to renew its lease. That theory has not been advanced in this proceeding.

the leased facilities and are also required to meet minimum requirements for cargo tonnage. Lessees are obligated to make supplemental payments to the Board for any years in which the minimum cargo requirements have not been met.

9. Assignees are able to use marine terminal facilities at costs lower than those charged to lessees inasmuch as assignees are not obligated for any portion of fixed costs or for minimum tonnage of cargo. Assignees use facilities under the terms of the tariff and do not enjoy preferred access to marine terminal facilities.

10. On June 12, 1997, NOS became a lessee of marine terminal facilities at the Henry Clay Wharf and Yard and at the Nashville A terminal. Later that year NOS moved to the Napoleon Avenue A/B terminal for which it had a lease which was effective through May 3 1, 1998, with the option of extendmg the lease for two successive one year periods. All of the facilities leased by NOS are along the Mississippi River.

11. NOS met its minimum tonnage requirement for the 1997-98 lease year and renewed its lease for the period from June 1, 1998, to May 3 1, 1999.

12. In March of 1999 NOS was uncertain as to whether it wished to renew its lease for an additional year. The uncertainty was due to the fact that NOS was reluctant to commit itself to another minimum tonnage guarantee because Chilean Lines, one of its major customers, was in the process of a reorganization.

13. On April 19, 1999, the Board[5] agreed to allow NOS a one month extension of the deadline for exercising its option to renew its lease (until June 1, 1999) provided that NOS satisfied

[5]The word "Board" will be used to designate not only members of the Board of Commissioners of the Port of New Orleans but also employees of the Port of New Orleans acting in the course of their employment. Similarly, entities such as NOS, Ceres and MSC will be identified by their company names rather than by the names of individual representatives unless a more specific identification is required for clarity.

its financial obligations under the lease and complied with instructions from the Board regarding water access at the Napoleon Avenue termmal.

14. On April 30, 1999, the Board extended until June 1, 1999, the deadline for NOS to exercise its option to renew the lease. This action was taken after NOS had satisfied its financial obligations; NOS was allowed to delay action with regard to water access until after it had decided whether to exercise the option.

15. One June 1, 1999, NOS requested and was granted an additional two days within which to exercise its option to renew the lease.

16. NOS elected not to renew the lease on the Napoleon Avenue A/B termmal.

17. On June 8, 1999, the Board wrote to NOS confirming its understanding of the decision of NOS not to renew the lease and that the option to renew had expired. The Board further stated that it would cooperate with NOS with regard to its continued operation at Napoleon A/B while the Board sought another lessee and that all cargo activity by NOS after June 30, 1999, would be subject to the terms of the tariff and to the availability of space as determined by the Board.

18. The Board permitted NOS to keep three trailers in the Napoleon A wharf area after June 30, 1999, under a preferential assignment.

19. On June 29, 1999, NOS requested a lease for the Napoleon A portion of the Napoleon Avenue terminal complex. The Board responded to the effect that it preferred to lease the Napoleon Avenue facility as a whole. NOS reiterated its request on August 18, 1999, and received the same reply from the Board.

20. On July 8, 1999, Ceres Gulf, Inc. ("Ceres") expressed interest in leasing the entire Napoleon Avenue complex. The Board responded to the effect that several marine terminal

operators had expressed similar interest and that no decision on the lease of that facility would be made for the next several weeks.

21. On August 10, 1999, Ceres advised the Board that MSC, a customer of Ceres at France Road No. 4 terminal (on the canal), wanted to move to a location on the river because of draft limitations in the canal. Ceres again expressed interest in leasing the entire Napoleon Avenue complex.

22. During the period from July 1, 1999, to September 10, 1999, NOS continued to service the vessels of its customers at Napoleon A/B under a preferential assignment. Charges for use of those facilities were assessed by the Board in accordance with the tariff.

23. On September 10, 1999, the Board informed NOS that its preferential assignment at Napoleon A/B would be cancelled as of October 31 and that no vessels would be allowed to berth at the Napoleon Avenue complex after September 30.

24. On September 10, 1999, the Board granted NOS an extension so as to allow it to service a vessel on October 2. The Board informed NOS that subsequent berthing requests would be approved or disapproved depending upon the Board's progress in leasing the Napoleon Avenue complex.

25. On August 19, 1999, MSC informed the Board that it had decided to move to the river but had not yet chosen a marine terminal operator. MSC expressed a preference to continue its relationship with Ceres because it was currently servicing MSC vessels in New Orleans. MSC stated that it also had discussions with TTO and LANCO.

26. On August 27, 1999, NOS informed the Board of its interest in negotiating for the lease of Napoleon A/B and Nashville C (also on the river) and surrounding marshland areas.

27. A letter dated September 22, 1999, from MSC to the Board confirmed the understanding of MSC that the Board would consider a reallocation of the Napoleon Avenue facility at its meeting in October. In its letter MSC further stated that, rather than awaiting the outcome of the October meeting, it intended to influence the Board's decision by urging that the Napoleon Avenue facility be leased or assigned to NOS. The stated reason for the request was that MSC had awarded a contract to NOS to service its vessels on the river in New Orleans.

28. In a letter dated September 23, 1999, the Board informed MSC that it would not make a final decision as to the disposition of the Napoleon Avenue facility until it had considered all of the applicants, including NOS, for that space. The Board further stated that NOS did not have a lease of any facility at that time and might not be chosen for lease negotiations. Finally, the Board stated that it was also considering whether to go forward with a reconstruction project and not lease the Napoleon Avenue facility to any of the applicants.

29. On October 11, 1999, the Board reminded MSC that the decision as to the future of the Napoleon Avenue facility would be made in accordance with long term objectives for the development of the port rather than to accommodate the immediate concerns of MSC. The Board also stated that it was highly likely that it would decide to develop a new container terminal at Napoleon Avenue rather than leasing the facility in its current condition.

30. By letter of October 11, 1999, to NOS the Board confirmed discussions on that date to the effect that it did not intend to assign space at the Napoleon A/B marshaling yards to any terminal operator for the foreseeable future. The Board further stated that it was considering a major reconstruction project at Napoleon Avenue which could begin as early as January of 2000. During the first phase of the project the wharves, sheds and Field G behind the sheds would be completely demolished. The only available space for handling cargo at this location would be 8.9 acres in the

Napoleon A/B marshaling yards. Priority in using that space would be given to entities already operating on the nver. The Board advised NOS that it should begin planning for the possible termination of all business activity in the Napoleon A/B sheds and at Field G on or about January 15, 2000.

3 1. On October 14, 1999, the Board gave written notice to all companies, including NOS, which had expressed interest in leasing the Napoleon Avenue facility. The notice stated that the Board would not commit to the allocation of the facility pending a decision as to its redevelopment as a container terminal.

32. On October 27, 1999, NOS again requested a lease of the Napoleon A/B facility and alleged that the Board had misled it into not renewing its lease.

33. On December 16, 1999, the Board decided to proceed with the redevelopment of the Napoleon Avenue terminal complex.

34. On December 16, 1999, the Board informed NOS that it would have to vacate the Napoleon A/B sheds as of midnight on February 14, 2000, but that it could continue using the marshaling yards on a ship-by-ship basis until that space was needed by the construction contractor, The Board also informed NOS that the only facility that was available for leasing was the Jourdan Road Terminal (on the canal).

35. On December 28, 1999, Henry Flanagan (the Vice President of NOS and its senior representative in New Orleans) requested information on leasing all or part of the Jourdan Road Terminal.

36. On December 30, 1999, the Board confirmed to NOS its understanding that NOS wished to lease half of the shed and approximately five acres of marshaling area at the Jourdan Road Terminal. The Board stated that it would consider a one year lease with a clause allowing the Board

to cancel the lease on 90 days notice; there would also be a minimum revenue guarantee to the port. The Board informed NOS that, should NOS decide not to lease a portion of the Jourdan Road Terminal, it would still be able to service vessels according to the tariff at available nonleased facilities.

37. By letter of January 6, 2000, to Tom Flanagan (president of NOS) in Beaumont, Texas the Board confirmed Tom Flanagan's advice that NOS was no longer interested in leasing the Jourdan Road Terminal and stated that the Board would pursue discussions with other companies which had expressed an interest in the facility.

38. On January 13, 2000, Henry Flanagan again expressed the interest of NOS in the Jourdan Road Terminal. He was informed that, in view of the communication from Tom Flanagan, all remaining space at the facility had been leased to another company.

39. On January 14, 2000, the Board confirmed to NOS that the Jourdan Road Terminal was not currently available and would not be for the next 90 days. The Board expressed a willingness to discuss arrangements with NOS after that time.

40. On January 26, 2000, the Board informed NOS that, because of a delay in the award of the demolition contract, NOS would be allowed continued use of the shed at Napoleon A until February 29 and that all cargo and equipment was to be removed from the Napoleon A/B demolition site by midnight on that date. The Board also informed NOS that the Jourdan Road Terminal would become available for lease on March 17 and that other options for leased space were very limited.

41. On February 15, 2000, the Board provided NOS with the major terms of a one year lease of all or part of the Jourdan Road Terminal beginning on or about the middle of March.

42. NOS did not lease any portion of the Jourdan Road Terminal.

43. The Foreign Trade Zone ("FTZ") is a facility adjacent to the river which the Board maintains for the purpose of storing import cargo which has not cleared customs and is intended either for further processing before customs clearance or for transshipment without customs clearance. The facility is operated under authority granted by the U. S. Customs Service.

44. At some time pnor to April 19, 2000, NOS made arrangements with the Danzas Corporation to store a quantity of containers and breakbulk cargo from M/V LAJA, which was due to arrive in New Orleans on April 20, in space assigned to Danzas in the FTZ. This arrangement was made without the knowledge or approval of the Board and required the Board to obtain the approval of the U. S. Customs Service.

45. NOS subsequently requested permission of the Board to use the FTZ to store containers and cargo from other vessels. The Board denied such permission on the grounds that the FTZ was not intended to be used for regular cargo operations and was only available for emergency overflow for long term lessees.

46. The Board has eight acres of unimproved land located at the foot of Napoleon Avenue which is commonly known as the "grassy area." The grassy area was only approved for the storage of chassis and similar items ofrelatively light weight because of its inability to support heavier cargo if its surface were to become muddy. One and a half to two acres of the grassy area is completely unusable due to the presence of cement foundations from demolished structures.

47. At all times pertinent to this proceeding the Board had in effect a document entitled FMC Tariff No. 2 which may be accessed by the public via the internet at www.portno.com.

48. Section III of the tariff, entitled "Use of Board Property", generally sets forth guidelines for the use of waterfront facilities by entities including marine terminal operators.

49. At various times relevant to this proceeding representatives of NOS or of Maritech Commercial, Inc., a firm of marine surveyors engaged by NOS, observed and photographed the presence of cargo and/or ongoing cargo operations at facilities to which NOS had been denied access by the Board.

50. At all times relevant to this proceeding P&O Ports and Gateway were lessees of marine terminal facilities owned or controlled by the Board.

5 1. On or about December 16, 1999, and thereafter the Board announced a policy of not leasing any portion of the Napoleon Avenue complex that was scheduled for renovation. The use of those facilities was limited to short term assignments in order to compensate lessees for the loss of use of or access to leased facilities resulting from the activities of the Board's construction and demolition contractors. The purpose of the policy was to minimize the possibility of delays and cost overruns in the construction project due to interference with the activities of the construction contractor.

52. On May 2, 2000, the Board solicited proposals from marine terminal operators, including NOS, for the use of the Napoleon Avenue complex subsequent to its renovation.

53, The proposal by NOS was submitted three days after the deadline of May 19, 2000, and, unlike the proposals from other interested marine terminal operators, was felt by the Board to be lacking in necessary detail.

54. On May 11, 2000, the Board held a special meeting in an effort to address the concerns of NOS regarding the allocation of marine terminal facilities along the river. The meeting was attended by Tom Flanagan on behalf of NOS. During the course of the meeting the Board offered NOS the use of any available space that it could find, including the Jourdan Avenue Terminal, so

long as its use did not infringe upon the rights of long term lessees or interfere with the activities of the construction contractor.

55. On May 12, 2000, the Board asked NOS to submit a written proposal for the use of a portion of the FTZ and the grassy area; the proposal was to be submitted by noon on May 16.

56. NOS did not submit the requested proposal but, at the end of the day on May 16, 2001, requested a meeting to discuss the matter.

57. On May 17, 2000, the Board again requested that WOS submit a proposal.

58. NOS did not submit a proposal but, on May 22, 2000, offered to use the grassy area as is. The Board rejected that offer.

59. NOS ceased doing business in New Orleans at or around the end of May of 2000.

Discussion and Analysis

Much of the precedent regarding the portions of the Act cited in the Complaint is to be found in decisions rendered by the Commission prior to the effective date of the Ocean Shipping Reform Act of 1998, 46 U.S.C. app. § 817d et *seq.* ("OSRA").[6] One of the effects of OSRA was to transfer language prohibiting an unreasonable refusal to deal or an unreasonable prejudice or disadvantage from section 10(b)(12) to sections 1 O(d)(3) and (4). The provisions of section 10(b)(12) prior to the enactment of OSRA were virtually identical to those now found in sections 1 O(d)(3) and (4).[7]

[6] OSRA went into effect on May 1, 1999.

[7] Section 10(b)(12) prohibited common carriers, either alone or in conjunction with other persons, directly or indirectly, from ". subject[ing] any particular person . to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . ." Since the enactment of OSRA those prohibitions have applied to ocean transportation intermediaries and marine terminal operators as well as to carriers.

A. Unreasonable Refusal to Deal or Negotiate

The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of OSRA. All that is required is that common carriers, ocean transportation intermediaries and marine terminal operators refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors. For example, in *Seacon Terminals, Inc. v. Port of Seattle, 26* S.R.R. 886,899 (1993), it was held that there was no statutory violation where the respondent port authority was shown to have had a reasonable basis for dealing with an entity other than the complainant in view of the complainant's demonstrated reluctance to enter into a long term lease. In *Consumer Electronics Shippers* Ass *'n* v. *ANERA*, 26 S.R.R. 766, 774 (1993), the Commission found that the respondent had not acted unreasonably in refusing to offer a "most favored shipper" clause to an ocean carriers' conference with which it had not previously dealt while offering the provision to a conference with which it had a long history.

An example of an unjustified refusal to deal is described in *"50 Mile Container Rules"*, 24 S.R.R. 411,455 (1987), *affirmed sub nom., New York Shipping Ass'n v. FMC, 854* F.2d 1338 (DC Cir. 1988), *cert. deniedsub nom., International Longshoremen 's Ass 'n v. FMC, 488* U.S. 1041, 102 L.Ed. 2d 990 (1989), in which it was held that adherence to a collective bargaining agreement did not justify acts of discrimination between shippers based only upon the location of cargo. In so ruling, the Commission found that the contractual obligations of the carriers to the longshoremen's union were not legitimate factors related to transportation.

NOS cites the refusal of the Board to allow it to use a portion of the Napoleon Avenue complex to service vessels of MSC as constituting an unreasonable refusal to deal. The result of that refusal was a cancellation by MSC of its contract with NOS.

NOS maintains that it could have used the requested portion of the Napoleon Avenue complex without interfering with the construction contractor and that, in fact, that portion was used for cargo operations by one of its competitors. NOS has advanced the same rationale in support of the proposition that its competitors enjoyed an unreasonable preference or advantage with regard to the use of various portions of the Napoleon Avenue complex at this and other times.

NOS has not denied that the Board announced and followed a policy of not allowing either leases or short term assignments of the Napoleon Avenue complex after December 16, 1999, or thereabouts pending its decision as to whether to undertake a major renovation of the facility. That policy was apparently adopted on the recommendation of David A. Wagner and was based upon his experience in managing major construction projects in the port of Baltimore and elsewhere. The Board reasoned that the risk of interfering with and delaying the construction contractor, with its attendant costs, outweighed the risk of loss of the income and productivity that could have been derived from allowing marine terminal operators to attempt to "work around" the activity related to the construction project. The policy was relaxed as necessary to compensate lessees for the disruption of their operations by the contractor. (See Wagner declaration, ¶¶73 - 8 1.)

During the course of a presentation at a special meeting of the Board on May 11, 2000,[8] Mr. Wagner acknowledged the likelihood that there would be space to carry on cargo operations in the Napoleon Avenue complex during the course of the construction project. However, he was adamant in his assertion that the risk of interfering with the construction contractor, thereby causing delays and cost overruns, was not acceptable (Board Exhibit 74). Again, the Board was willing to

[8]The purpose of the special meeting was to address the problems of NOS.

undertake the risk to accommodate its lessees but not for other applicants (such as NOS) for marine terminal facilities.

It is possible to characterize the Board's policy as overly conservative, inflexible and insufficiently responsive to the needs of users of the port such as NOS. Indeed, the opinion of Clovis Morrison, a consulting engineer engaged by NOS, was that cargo operations could have been allowed to proceed, at least to a limited extent, without interfering with construction activity. However, while the Board's policy might have been debatable it cannot rationally be characterized as unreasonable or as being unrelated to legitimate transportation considerations.

NOS has suggested that the Board's stated policy was a pretext to steer the MSC business to P&O Ports as an inducement to the company to make a large capital investment in the Napoleon Avenue renovation project. According to that scenario, the Board was distressed to learn that NOS had "landed" the account of a major container carrier after having declined to renew its lease because of a downturn in its business activities.

That theory fails for two reasons. In the first place, there is no evidence to show that the Board did not apply the policy in a consistent manner. Secondly, the evidence indicates that MSC was prepared to give its business to any marine terminal operator that could service its vessels at a berth along the river and that it initially expressed a preference to remain with Ceres which was currently servicing its vessels along the canal (Board Exhibit 38). MSC later used its purported relationship with NOS in an admitted attempt to present the Board with a *fait accompli so* as to induce the Board to immediately lease or assign nverside space to NOS rather than, as previously announced, delaying commitments as to the use of any portion of the Napoleon Avenue complex until after it had determined whether to proceed with the contemplated renovation project (NOS Exhibit 1). The Board rejected the approach by MSC while restating its previously announced

intentions (NOS Exhibits 2, 3). It is significant to note that NOS applied for a lease of only the Napoleon A portion of the complex (Board Exhibit 28) while other marine terminal operators expressed interest in the entire facility (Board Exhibits 30, 37).

In summary, the evidence clearly shows that, regardless of its desire to attract an investment by P&O Ports, the Board's refusal to allow NOS to continue to use the Napoleon Avenue complex was motivated by a desire to minimize possible interference with the construction contractor if the renovation project was eventually approved and. if the project did not go forward, to lease the entire facility to a single marine terminal operator. Therefore, in spite of the harsh consequences to NOS, the Board did not *unreasonably* refuse to deal within the meaning of sections 1 0(b)(10) and 1 O(d)(3) of the Act.

B. Unreasonable Preference or Advantage

The threshold criterion for the existence of an unreasonable preference or advantage was established in *Volkswagenwerk* v. *FMC*, 390 U.S. 261,279, 19 L.Ed.2d 1090 (1968). Although the issue was addressed with regard to the meaning of section 16 of the Shipping Act of 1916, the precedent is controlling because of the close similarity of section 16 to section 1 O(d)(4) of the current Act." The Supreme Court stated that discriminatory treatment will not be found to exist in the absence of a determination that a third party has enjoyed an unfair advantage over the complainant. The favored entity need not have been in direct competition with the complainant, but it must have been similarly situated in that both were seeking the benefit which was denied to the complainant. This is the so-called "triangular analysis" which has been applied by the Commission in cases such as *Credit Practices of Sea-Land Service, Inc., etc., 25* S.R.R. 1308, 1313 (1990).

'Section 16 made it unlawful, ". . . . to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic . . . or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever "

The determination of reasonableness, in the context either of an alleged refusal to deal or negotiate or of an alleged preference or disadvantage, is largely dependent upon specific facts rather than broad generalizations. A review of the factors which have been considered is to be found in *,411 Marine Moorings, Inc. v. ITO Corp of Baltimore*, 27 S.R.R. 539,545 (1996) They include such considerations as the maintenance of consistent service and the economic well-being of the port as in *Petchem, Inc. v. Canaveral Port Authority*, *23* S.R.R. 974 (1986), *affirmed sub nom., Petchem,* Inc. v. *FMC*, 853 F.2d 958 (DC Cir. 1988). The Commission will not substitute its own business judgment for that of an entity (such as the Board) that is responsible for the day-to-day operation of a port, nor will it abrogate its responsibility to determine whether the entity violated the Act, *Petchem, 23* S.R.R. at 989; *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District*, 27 S.R.R. 1123, 1130 (1997).

Another factor to be considered is the effect of the challenged actions on competition. However, the Commission has made it clear that a strict antitrust analysis is not appropriate in adjudicating an alleged violation of the Act, Gulf *Container Line v. Port of Houston Authority,* 25 S.R.R. 1454, 1459 (1991). In other words, a respondent will not avoid liability under the Act by showing that it did not violate antitrust statutes.

The Board has argued that the claim by NOS as to unfair preference or advantage fails because of the lack of a threshold showing that it was sufficiently similar to the preferred entities, all of whom held leases to facilities in the port. Neither *Volkswagenwerk* nor subsequent rulings by the Commission give specific guidance as to the standards for determining similarity. It may be rationally concluded that all marine terminal operators, whether or not lessees, were similarly situated with regard to their need for access to facilities along the river. The fact that NOS was not

a lessee is relevant to the issue of the reasonableness of the preference or advantage rather than to the existence of comparable preferred entities.

The reasonableness of the Board's policy with regard to the Napoleon Avenue complex has already been discussed with regard to its allegedly unlawful refusal to deal. That rationale is also applicable to the determination that the Board did not act unreasonably in restricting access to the Napoleon Avenue complex and other facilities under its control to lessees whose operations had been disrupted by the activities of the construction contractor.

In its reply brief NOS challenges the preference afforded Gateway and P&O Ports on the grounds that neither company had a lease on any portion of the Napoleon Avenue complex and that the Board owed them no legal duty to provide assigned space. The former argument ignores the fact that the assignments were intended to make up for the use of leased space that was affected by the construction project. The validity of that proposition is not diminished by the location of the space that was leased by the preferred companies. The latter argument has no relevance to the issue of whether the Board violated the Act in granting preferential treatment to current lessees. Even if the Board had no contractual duty to compensate its lessees for the loss of use of or access to leased premises, it was entitled to attempt to compensate them for such loss if for no other reason than to encourage marine terminal operators to assume the obligations associated with long term leasing. It cannot be seriously maintained that such a motive is not related to transportation concerns.

The allocation of space in the FTZ involved an additional factor in view of its special purpose. NOS has not directly contested the proposition that the FTZ was specially designated with the approval of the U.S. Customs Service for the storage of cargo which would either be transhipped out of the country in its original condition without customs clearance or altered (probably as a component in a manufacturing or assembly process) prior to clearance. On or about April 15, 2000,

NOS gained temporary access to a portion of the FTZ by dealing directly with Danzas Corporation, an assignee, rather than with the Board (NOS Exhibit 39). On May 5, 2000, the Board gave Danzas notice of the cancellation of its preferential assignment as of June 5 and offered to replace it with an assignment agreement which specifically prohibited handling, storage or other activity with regard to maritime cargo (NOS Exhibit 40).

The FTZ was not used exclusively for cargo which had not cleared customs. It was also used as a short term storage area for overflow maritime cargo from leaseholders. The Board relaxed its policy in favor of NOS by allowing the storage of about containers from Chilean Lines vessels for which NOS had no other space (Board Exhibit 66). The Board requested and received special permission from the U.S. Customs Service for this arrangement (Board Exhibit 67). NOS was finally denied further use of the FTZ after containers from Chilean Lines vessels had brought the facility to the limit of its storage capacity (Board Exhibit 83).

Although NOS has characterized the modification of the terms of the assignment to Danzas as proof of the Board's animosity towards NOS, that action by the Board can more reasonably be characterized as evidence of its desire to maintain control of the FTZ so as to prevent actions which would jeopardize its special status.

The allegations by NOS concerning the grassy area are the least tenable of all. As the name implies, the grassy area is unimproved land which, after a heavy rain, cannot support heavy cargo or loaded containers. Clovis Morrison, an engineer engaged by NOS, obtained an estimate of $745,100.00 to prepare the surface to accommodate cargo (Board Exhibit 87). Approximately four acres (of a total of eight) were earmarked as makeup space for Coastal Cargo, a lessee which had been adversely affected by the construction project (Board Exhibit 73). Furthermore, a portion of the grassy area was unusable because of the presence of foundations from demolished buildings.

In view of the expressed interest of NOS in using the grassy area, the Board invited it to submit a detailed proposal for improving the facility. No such proposal was ever submitted (NOS Exhibit 38) and NOS eventually proposed that it be allowed to use the grassy area without improving it. Not unexpectedly, that proposal was rejected by the Board.

NOS has cited certain portions of the Board's tariff m support of the proposition that it acted unreasonably in the allocation of marine terminal facilities along the river (NOS Opening Brief, page 29). Specifically, NOS alludes to Items 308, 3 10 and 312 as establishing the standards which the Board had obligated itself to follow; NOS has not stated the precise manner in which those provisions were allegedly violated nor does the evidence indicate that NOS invoked them in any of its many meetings and correspondence with the Board.

Item 308 is entitled "First Call on Berth Privilege or Preferential Assignments, Groups I, II or III." First Call on Berth Privilege is defined as:

> . . . a prior claim to be assigned the use of a particular public wharf and berth by vessels pursuant to a written grant to *the owners and agents,* and shall not be construed as granting exclusive use or absolute control of a particular wharf and berth (emphasis supplied).

There is no indication that NOS has initiated this proceeding other than as a marine terminal operator or on behalf of vessel owners or agents. Even if that were not so, Item 308 further states that:

> First Call on Berth Privilege *may* be granted upon a particular wharf, *when available,* upon application (emphasis supplied).

NOS maintains that the Board denied it the use of space which at the time either was not being used or which could have accommodated the needs of NOS in addition to those of other users. In retrospect that might have been true. However, the Board was entitled to adhere to its policy, as discussed above, of reserving certain facilities for lessees who might have been affected by the

construction project. Taken in that context, the facilities which were denied to NOS were not available at the time their use had been requested.

Item 3 10 is entitled, " Preferential Assignment." The item states that:

> **Board** facilities may be preferentially assigned by the Marine Terminal Superintendent to applicants for other maritime-related activities. **Preferentially Assigned** facilities **may not be** utilized for the receiving or discharging of cargo directly to or from ocean-going vessels. Such maritime-related activities may include, but are not limited to, bagging operations, unitization, shrink-wrap operations, Vac-U-Vator services, container storage and repair, vessel repair, loading and unloadmg of rail cars and/or barges, fabrication of one-way pallets and other similar maritime related activities. The Preferential Assignment shall not include exclusive use, but merely a prior claim to the specified use (emphasis in original).

Once again, it is difficult to determine why NOS feels that the Board violated the terms of Item 3 10 to its detriment. The record is devoid of evidence to suggest that NOS was requesting use of Board facilities for any of the "other maritime-related activities" specified in this portion of the tariff other than possibly for container storage.

Finally, Item 3 12 is entitled, "Use of Marshalling *(sic)* Yards, Improved and Unimproved Lands." Those areas are designated as Class A, B, C or D based upon their, ". . . *surface preparation*, location, configuration, infrastructure improvements, etc. (emphasis supplied)." Item 3 12 further provides that:

> Subject to an area's availability and its classification, it may be used pursuant to a multi-year lease, one-year assignment, 60-day assignment, 30-day assignment, or per diem agreement. Multi-year lease rates are negotiable.

The clear intent of this portion of the tariff is to set forth the various arrangements and conditions under which certain facilities may be allocated. None of the language therein may be fairly construed as depriving the Board of its discretionary powers. More specifically, there is no evidence to suggest that the Board violated Item 3 12 in its dealings with NOS. For example, the surface preparation (or lack of same) was a legitimate factor in allocating the use of the grassy area. As

stated above, the needs of lessees could be considered in determining the availability of space controlled by the Board.

In its reply brief the Board has alluded to various incidents in support of its contention that NOS was a difficult and unreliable tenant and that the Board was justified in its lack of confidence that NOS would promptly vacate any assigned space because of the needs of the construction contractor. NOS has submitted evidence to rebut those contentions and has stated that the Board expressed its concerns only during the discovery process. NOS maintains that, in view of the timing of the Board's expressions of concern, they are no more than belated attempts to justify the numerous adverse actions taken against it.

NOS is correct in its criticism of the Board's timing in raising the issue of its past record as a lessee. However, the issue is not critical inasmuch as the Board's actions were justified by legitimate concerns as to interference with the construction contractor. There is no evidence to suggest that those actions were influenced by a general animosity towards NOS.

It may be fairly assumed that various members of the Board's staff became exasperated with the repeated importuning of NOS for space along the river. It is also possible (although not directly proven) that the reputation of NOS, whether or not deserved, played a part in the refusal of the Board to grant NOS additional concessions. However, the record is replete with evidence showing that NOS was granted repeated extensions of deadlines to vacate marine terminal facilities. If, as suggested by NOS, it was the victim of a vendetta by the Board those extensions could easily have been withheld.

It is not necessary to discuss the merits of NOS's claim for reparations in view of the fact that the Board has not been found to have acted unreasonably within the context of the Act. However, it seems appropriate to note that NOS, in spite of its concern about being forced out of a port where

it had allegedly conducted business for over a hundred years, declined the opportunity to lease space at the Jourdan Road Terminal. To be sure, that space (which was along the canal) was less desirable than the space along the river which NOS had so vigorously sought. Nevertheless, the lease of that space would have allowed NOS to continue to operate in New Orleans and would, perhaps, have improved its ability to eventually return to a site along the river.

Summary and Conclusions

It is possible to understand and to sympathize with the frustration of NOS in its eventual inability, in spite of repeated efforts, to obtain mar-me termmal space along the river after it had decided not to exercise the option to renew its lease at the Napoleon Avenue complex. It clearly had not, and perhaps could have not, foreseen the consequences of that decision or of the impact of the Napoleon Avenue renovation project on the availability of other space along the river. However, the weight of the evidence clearly indicates that NOS was not the victim of either an unreasonable refusal to deal or negotiate or of an unreasonable preference or privilege.

The complaint by New Orleans Stevedoring Company against the Board of Commissioners of the Port of New Orleans is dismissed.

Paul B. Lang
Administrative Law Judge

Washington, D.C.
June 27, 2001